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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Shasta)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JOSEPH LEE JONES,  
  
Defendant and Appellant.

C049367  
Super.Ct.No. 01F6658

On the date set for trial, defendant Joseph Lee Jones entered a negotiated plea of guilty to worker's compensation applicant fraud (Ins. Code, § 1871.4; count 1), in exchange for dismissal of the remaining counts (insurance fraud and grand theft) with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, probation with a stipulated 60-day county jail term, and \$16,699.57 in victim restitution.

About two months after entering his plea, new counsel appeared on defendant's behalf and advised that he would be filing, and later did file, a motion to withdraw defendant's

plea. The court relieved defendant's former counsel. After a hearing, the court denied the motion and sentenced defendant in accordance with the plea agreement.

Having obtained a certificate of probable cause (Pen. Code, § 1237.5), defendant appeals, contending that the trial court abused its discretion and erred in denying his motion to withdraw his plea. We disagree and will affirm the judgment.

#### FACTS

The facts are taken from the probation report as defendant pleaded guilty. In September 1998, defendant injured his back while working for the City of Yuba. He received medical treatment including two back surgeries and temporary disability payments. His pain continued, and he was prescribed several medications. He complained that his pain had not been relieved and that he could no longer work. In March 2001, defendant was videotaped "pulling the starter cord on a gas powered leaf blower, and use of various garden tools, with no noticeable limitations." After seeing the videotapes, defendant's doctors agreed, "defendant was functioning at [a] capability better than he claimed his injuries would allow, and that it appeared he misrepresented his ability to function."

#### DISCUSSION

Defendant contends the trial court abused its discretion in denying his motion to withdraw his guilty plea.

## **Background**

### **Change of Plea**

In a change of plea form, defendant initialed the following statements:

"I have discussed the negotiated plea with my attorney and my attorney has answered all my questions. I have no other questions I wish to ask my attorney before entering this plea. We have discussed possible defenses and motions and I am convinced it is in my best interest to enter this plea.

"Other than what is written in the 'Plea Agreement' part of this form, no other promises have been made to me, by anyone, to convince me to enter this plea.

"No one has made any threats to me or anyone close to me nor has anyone applied force or violence to me or anyone close to me to convince me to enter this plea. I am entering this plea voluntarily and of my own free will."

Defendant signed the form under penalty of perjury.

At the entry of plea hearing, defendant's attorney, Elliot Burick, stated that he had discussed the change of plea form with defendant: "Some of the items that were complicated I explained to him in full rather than read, and then most of them I read to him directly and explained." The following discussion ensued:

"THE COURT: Okay. So would it be fair to say, [defendant], that you either personally read or had your attorney read to you everything on this form?

"THE DEFENDANT: Yes.

"THE COURT: And the things that you were not sure of as to their meaning, did he explain to you?

"THE DEFENDANT: Yes.

"THE COURT: Do you feel you have had adequate time to confer with your attorney in deciding whether to enter into this negotiated plea?

"THE DEFENDANT: Yeah."

Defendant also confirmed that he initialed the items on the plea form because he understood them and agreed to them. The trial court explained to defendant that his guilty plea might affect his ability to receive future worker's compensation benefits. Defendant stated that he understood and that no promises had been made to him about such. Defendant confirmed that he had "discussed all the possible defenses in this case" with his attorney. The court then inquired about defendant's medications:

"THE COURT: Have you taken any medication or controlled substances other than prescribed medication.

"THE DEFENDANT: Today, no.

"THE COURT: Are you under the influence of any substance that affects your ability to use your sound judgment and make good decisions?

"THE DEFENDANT: No, just the medication, just the medication that I'm on.

"THE COURT: Okay. Are you on pain medication?

"THE DEFENDANT: Yes.

"THE COURT: What is it.

"THE DEFENDANT: Thirty milligrams of Vicodin.

"THE COURT: What other medications are you taking?

"THE DEFENDANT: I got a morphine pump in me, and it's got pseudo fentanyl (phonetic spelling) and all that.

"THE COURT: It's got --

"THE DEFENDANT: Pseudo fentanyl.

"THE COURT: Pseudo fentanyl?

"THE DEFENDANT: Yes.

"THE COURT: Are these medications you have been taking for some time?

"THE DEFENDANT: Yes.

"THE COURT: So are you used to taking them?

"THE DEFENDANT: Yes.

"THE COURT: You're accustomed to them?

"THE DEFENDANT: Yes.

"THE COURT: Are you able to drive?

"THE DEFENDANT: Yeah.

"THE COURT: Okay. And are you able to take care of your necessary business decisions in your every day life?

"THE DEFENDANT: Seem to.

"THE COURT: Yes?

"THE DEFENDANT: Yes.

"THE COURT: Okay. And so do you feel mentally that you have all your faculties about you?

"THE DEFENDANT: Yes."

Defendant apparently hesitated but confirmed that he gave up his right to remain silent. The court queried:

"[Defendant], I don't understand your hesitation." Defendant responded, "I've never really been in any trouble before, and this is scaring the hell out of me, to be blunt." After the trial court explained the right to remain silent, defendant again confirmed that he gave up such right. Defendant thereafter entered his guilty plea. The court found that defendant fully understood "his constitutional rights, the nature of the crime charged, consequences of his plea, he's knowingly, intelligently and voluntarily waived those constitutional rights, freely and voluntarily he's entered his plea."

#### Motion to Withdraw Plea

In asserting good cause supporting his motion to withdraw his plea, defendant claimed evidence presented at the hearing on said motion would establish the following:

"1) a general lack of preparedness by trial counsel, of which both defendant and his wife were aware, including a total or near total failure to contact, interview, or subpoena any defense witnesses for trial; 2) prior to his plea, defendant suffered a spinal injury, which resulted in his doctor p[re]scribing him a substantial amount of prescription drugs, of various types, which significantly [a]ffected his ability to abstract, analyze and solve problems, think quickly, and express himself effectively, to the point that his wife generally has to assist him in most endeavors that entail these types of mental tasks; 3) that, on the day he plead guilty (October 13[], 2004), because of the discomfort, additional to that he experiences on

a daily basis, of driving to Redding from his home in Biggs and the stress of a major court appearance, defendant took more medication than normal (as is medically appropriate in the case of 'breakthrough' pain), and was thus even more [a]ffected than usual; 4) that, on October 13[], 2004, his attorney made several negative and unrealistic statements about his ability at law to present a defense; 5) that on that same date his attorney made several improper statements about the sentence defendant would receive after being found guilty, including several extremely unlikely, and frankly, shocking statements that he attributed to the trial judge; 6) that the trial attorney, despite numerous attempts to speak with him on the part of the defendant and his wife, aside from a very few extremely brief exchanges in court, only spoke with them once regarding trial strategy prior to the October 13th, 2004, court appearance with a total of about twenty to forty minutes in which he was actually in conversation with defendant; 7) that on October 13, 2004, the trial attorney approached [defendant and his wife], in the hall of the court, told [defendant] he had already spoken with the judge and that he ([defendant]) had ten minutes to 'make his decision'; 8) that the trial attorney made several misleading and inaccurate statements regarding the likelihood that defendant would be able to have his county jail sentence transferred to the Butte County Work Release Program; 9) that defendant was laboring under the inaccurate assumption, based upon the comments of his trial attorney and his Workman's Compensation Attorney, that he would not lose benefits and medical treatment because of his plea."

Defendant submitted his and his wife's (Deidre) declarations in support of the motion. Deidre stated that defendant took many prescription medications for pain, anxiety, and insomnia and had trouble with recollection and verbal expression. She believed that defendant's inability to remember or faulty recollection was due to his medications, which explained why she was involved with all of his decision making including that connected with his criminal case, worker's compensation case, and doctor visits. When Burick discussed the criminal case with defendant, Deidre claimed Burick directed his comments to her rather than defendant. Deidre claimed Burick met with her and defendant once in Burick's office, on October 15, 2003, for an hour and a half, and half that time Burick was elsewhere in the office. He had not reviewed the videotapes or the file but planned to file something to excuse defendant from appearing and to change the case to another county. He planned not to prepare for trial until he knew he was going to trial and had a reason not to call every defense witness she and defendant had mentioned. When they appeared in court seven to ten times, Burick never had time to discuss a defense with them. He only called to explain he needed a continuance or to inform defendant of a court date. Deidre overheard defendant tell Burick over the phone that he wanted Dr. McKinney as a witness but Burick suggested otherwise.

At the trial readiness hearing, Burick refused to discuss Deidre's list of questions, told her any in limine motion would be untimely, and refused to discuss the defense in the case. He



said Dr. McKinney would be called and denied saying otherwise a few days earlier. She and defendant talked to Burick's investigator for the first time five days before trial. The investigator said no witnesses had been subpoenaed by the defense for trial and he did not mention anything he was working on for trial. Two days before trial, Burick called defendant and Deidre got on the extension. Burick was unsure which doctor to call as a witness and that he would not call Dr. McKinney. Burick told them that he believed the prosecution's theory was that defendant saw doctors only to get drugs. On the date set for trial, Burick told them that he could not win the case, referring to worker's compensation cases. Looking at his watch several times, Burick told them that the judge was mad and getting madder, wanted the case resolved, and that defendant would be going to prison if the judge had it his way, and that defendant had 10 minutes to make up his mind about a plea. Burick explained the consequences of a plea of no contest including that such plea probably could not be used against defendant in a worker's compensation case; they were under the impression that defendant's plea would not affect his future medical treatment.

In his declaration, defendant claimed he was on several medications that affected his ability to think clearly and to recollect. He relied upon Deidre to recount various events including meetings with his criminal defense lawyer and worker's compensation lawyer. He reviewed Deidre's declaration and did not recall all the events or conversations but to the extent he

did, his recollection was the same. When he appeared in court to enter his plea, he believed Burick was not prepared for trial since to his knowledge no witnesses had been interviewed let alone subpoenaed for trial. Defendant felt like he had "no choice." He stated, "I am informed and believe that, due to the pain involved" in riding in the car to court that "I doubled up on my oral painkillers, as well as my muscle relaxers on that day. I have been told this, and, though I do not remember exactly what I took that day, that would be consistent with my usual practice in such a situation."

In opposition, the People argued defendant had failed to show good cause by clear and convincing evidence. In support of their opposition, the People included a transcript of the entry of plea hearing; the declaration of Laurie Dunlap, the attorney representing the City of Yuba in defendant's worker's compensation case, stating that she had served defendant's worker's compensation attorney with documents on November 17, 2004, seeking to rescind his award of temporary disability and medical treatment; and a declaration from the prosecutor stating that Burick had reviewed defendant's motion and would testify that most of the statements attributed to him (Burick) were not true.

#### Hearing on Motion to Withdraw Plea

At the hearing on defendant's motion, Deidre Jones testified that she and defendant had been married for more than eight years. On September 8, 1998, defendant sustained an "industrial back injury[.]" Deidre accompanied defendant to all

his doctor and attorney appointments, taking notes because defendant's recollection of the meetings was different from her recollection. She noted that defendant was on a lot of pain medication. She claimed that defendant had not eaten before the October 13, 2004 plea proceeding and had taken his normal dosage of medication between 6:00 a.m. and 6:30 a.m. About 10:00 a.m. when they arrived at the courthouse, defendant took a second dosage of medication. She confirmed that her statements in her declaration were true and correct.

On cross-examination, Deidre stated she had not told Burick that defendant had taken a second dose of medication. Deidre admitted that she did not specifically remember whether defendant had doubled up on his medications each and every time they drove from their home to the court for appearances, in excess of 20 times since 2002. She only recalled defendant doing so on two occasions, the trial readiness conference and the date of jury trial. Although she recalled what defendant had to eat the night before trial, she did not recall what she had eaten. She also did not recall the exact time they left for court but somewhere between 7:45 a.m. and 8:00 a.m. She saw defendant take his first dose of medication at home and the second dose in the car.

On questioning by the court, Deidre could not explain why she made a mental note of the medication defendant had taken the day he entered his plea. She could not say whether she thought defendant was taking too much medication but believed at the time it affected his judgment but admitted she said nothing to

Burick or the court or the prosecutor about it, explaining she and defendant "were afraid to say no to anything" based on the picture Burick had painted of the judge. Deidre stated that defendant had taken the same dosages of medication for the hearing on his motion to withdraw his plea as the dosages he had taken for the hearing to enter his plea.

Dr. Pervez Iranpur specializes in anesthesiology with a subspecialty in pain management. On June 27, 2002, Dr. McKinney referred defendant to Dr. Iranpur for pain management. Dr. Iranpur recounted defendant's prescribed medications and dosages. Based on a hypothetical question using Deidre's account of defendant's medications and times of two dosages, Dr. Iranpur opined it was "[l]ikely" that defendant's cognitive abilities would have been affected on the morning of October 13, 2004. Dr. Iranpur explained that one of defendant's medications, Hydrocodone, alone "can cause sedation, can cause mental clouding and impairment, physical as well as mental impairment" and his other medications, including Soma, a sedative, dextromethorphan, Zanaflex and Remeron, "all" affect someone mentally. Dr. Iranpur opined that chronic pain may affect a person's mental ability and stress could elevate the pain. Dr. Iranpur did not believe that another person would necessarily notice if a patient on such medication was drowsy or sedated, even on questioning, or that the patient could even verbalize his impairment. Dr. Iranpur stated that based on defendant's medications, he is advised to avoid operating heavy machinery, cooking near a flame, making judgments, or signing

papers. Defendant had been taking Hydrocodone, Soma and Remeron since 2002 and the other two since September 2003. Dr. Iranpur noted that over time, a person's judgment should not be affected by a regular dosage and that defendant had been on a stable, regular dosage for over one year other than the Hydrocodone; defendant's second dosage on the same day did not constitute a regular dosage.

Defendant testified and confirmed his medications as listed by Dr. Iranpur. He stated he had been taking the same dosage for two years. On the day he entered his plea, he took one dose. He later stated that for the hearing on his motion to withdraw his plea, he had taken half of what he had taken when he entered his plea. He had concerns about his case after speaking with Burick who told defendant he had 10 minutes to make up his mind whether to take the plea rather than face 15 years, 5 years for each count, and that he had a 20 percent chance of winning at trial. Defendant was nervous. He had only discussed the case with Burick one time. Burick told defendant "the judge wanted to make an example out of [defendant] . . . ." When the judge questioned him at the entry of plea hearing, defendant felt "[m]isrepresented and backed in a corner" and his "lawyer tells me or leads me to believe everything is fine, and then all of a sudden says you got to plead guilty or you are going to go to prison, and like I say, outside of traffic tickets, I have never been in any trouble."

On cross-examination, defendant stated that he specifically remembered speaking with Burick on the day defendant entered his

plea but never told the judge that he had taken a second dose of medication. When asked about his declaration concerning the second dose and that he had been told he had taken a second dose, defendant said he did not remember signing the declaration with that statement and insisted that he remembered how many pills he took. He claimed he remembered taking only the one dose before he left his home to go to court.

When asked by the court about his change of plea form, defendant initially claimed he did not remember it. When shown the form, he initially claimed he signed it but did not initial it. He finally admitted that he initialed it "because [he] felt [he] had to, . . ."

Defendant admitted that the worker's compensation insurance companies attempted to withdraw his benefits "as soon as [he and his wife] left the court[,] after he entered his plea.

Burick testified. Prior to defendant entering his plea, Burick advised defendant that he (Burick) needed to hurry or the judge would be upset at him, not defendant, and never told defendant or Deidre that the judge wanted to send defendant to prison. Burick informed defendant that the maximum he faced was five years but that was unlikely and that the prosecutor's offer of probation with a county jail term of 60 days was reasonable. Other than five or six court appearances when he spoke with defendant, Burick spoke with defendant and Deidre four to six times for one to two hours each time in his office. Deidre "would butt in" all the time when Burick spoke with defendant at

the court appearances. Defendant relied on Deidre for the names of all his doctors.

On the day defendant entered his plea, Burick met with defendant for about 30 minutes prior to the commencement of proceedings. Altogether, Burick spoke that day with defendant for a total of more than one hour prior to defendant entering his plea. Deidre joined the conversation at some point. Burick asked defendant about his medication. Defendant said that he had taken nothing unusual, just his normal medication. Deidre offered nothing to contradict defendant. Burick noticed nothing unusual about defendant's actions or verbal expression and he appeared to comprehend what was being discussed. Burick made no promises to defendant where he would be able to serve his time and explained that he would probably be rejected for work release but was a good candidate for home electronic confinement. Burick made no promises about defendant's worker's compensation case, telling him that was not his specialty. At first, Deidre was against defendant entering a plea but later decided it was in his best interests.

Burick explained that he had prepared subpoenas for four to five witnesses but had not served them. He was waiting until he "had a better idea when the prosecution would finish presenting their case." Burick planned to have his investigator affect service when needed. He held up service because he had not decided whether they were needed and because he could not give the witness a particular time, specifically Drs. McKinney and Iranpur, but had called their offices to notify them

approximately when they may be subpoenaed. Burick did not want to call the witnesses desired by defendant and Deidre because he (Burick) believed their testimony "would only hurt" defendant. Burick prepared for cross-examination of the prosecution's doctors. Burick denied telling defendant and Deidre that it was too late for any motions in limine. Burick recalled that they came to his office after the trial readiness conference and they discussed the case for about an hour, including the defense. Burick denied making any promise about defendant's continued worker's compensation. Burick denied that either defendant or Deidre mentioned that defendant had not slept the night before or that he had doubled up on his medication.

On cross-examination, Burick admitted that he had not kept a specific record of when he met with defendant but used court dates and other notations to jog his memory. Burick's recollection was based on his custom and habit. Burick had turned over his "complete trial notebook" to defense counsel who had not brought it to court for the hearing on the motion; without it, Burick was unable to answer specific questions about his meetings with defendant.

Burick explained that there was one defense - whether on a good day defendant could do "extraordinary things" (for 45 minutes to an hour, defendant mowed the lawn, used a manual trimmer and other tools in the yard; the next day, he was more active and rode his motorcycle with a passenger), because of all the pain medication that he took, noting that the prosecution had films showing defendant doing such things and defendant's



deposition wherein he denied that he could do such things. Burick had read the reports of defendant's treating doctors who had seen the films and who opined that defendant was exaggerating his disability. Burick noted that Dr. Brown had opined in the alternative, that defendant might have had a good day because of the pain medication. Knowing that the prosecution would call Dr. Brown to testify, Burick had prepared for cross-examination. Burick believed that other than Dr. Iranpur, defendant's doctors would likely not provide favorable medical testimony. Dr. Iranpur had not seen the film. Burick knew of no defense expert who would provide favorable testimony.

Burick concluded that defendant would not have made a very good witness. Defendant was not a thinker, did not seem to understand until something was explained numerous times, could not focus, and used poor English. Burick discussed with defendant whether his problems had anything to do with his medications.

Burick explained why he had not served the doctors with subpoenas to testify. He uses the cooperative method, which had always worked for him, whereby he notifies the doctors in advance that they would be subpoenaed on or about a certain date and time but informs them that he is unable to give them an exact time.

On redirect, Burick believed that he was able to explain things to defendant to the point that he understood. Burick frequently found his criminal defendant clients had little education, requiring Burick to repeat explanations about the

process and defenses. Other clients also had problems expressing themselves.

On recross, Burick was presented with an exhibit prepared by Deidre Jones, which listed defendant's doctors and purportedly summarized conversations the Joneses had with the doctors. Burick recalled seeing the list months before defendant entered his plea.

#### Trial Court's Ruling

After argument by counsel, the trial court denied the motion to withdraw the plea, finding no clear and convincing evidence to justify it. The judge recalled examining defendant about his medications and noted that defendant stated on the plea form that he had sufficient time to discuss the case with his attorney. With respect to whether defendant had been intimidated or threatened, the court found both defendant and his wife's testimony "less than credible" and Burick's testimony "credible." The court noted that although defendant and his wife claimed double dosing of medications, defendant conveniently claims to remember what Burick told him about the judge's threats and defendant's state of mind in view of the same. With respect to Burick's competence, the court found no clear and convincing evidence that there was a lack of preparation or inadequacy of counsel. The court found that Dr. Iranpur was "credible, but his answer to the hypothetical question was contingent on the accuracy of the facts," facts supplied by Deidre Jones who the court found lacked credibility and whose testimony was unpersuasive. The court found that

defendant testified contrary to his sworn declaration and contrary to his sworn change of plea form. The court concluded that the "plea was appropriately entered[,]" "an exercise of the defendant's free will," "not threatened or coerced," and defendant was simply suffering from "buyer's remorse."

### **Analysis**

Penal Code section 1018 provides that a court may permit a defendant to withdraw his guilty plea before judgment has been entered upon a showing of good cause based on clear and convincing evidence. Good cause is "[m]istake, ignorance or any other factor overcoming the exercise of free judgment" and includes "'inadvertence, fraud or duress.'" (*People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Weaver* (2004) 118 Cal.App.4th 131, 145-146.) "'A plea may not be withdrawn simply because the defendant has changed his mind.'" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) A trial court's determination whether to permit a defendant to withdraw a guilty plea is discretionary and its ruling will not be disturbed on appeal absent a showing of abuse of discretion. (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.) An abuse of discretion occurs when the court "exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.) "[A] reviewing court must adopt the trial court's factual findings if substantial evidence supports them." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) "Where two conflicting inferences may be drawn from the

evidence, it is the reviewing court's duty to adopt the one supporting the challenged order." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 104.)

Defendant argues that the trial court applied the wrong legal standard. He argues the proper standard is whether defendant exercised "free judgment" in entering his plea, that is, whether there was an impact on defendant's judgment, but the trial court utilized a different standard, that is, whether defendant's "free will was overcome" or whether the plea was an "exercise of his free will," which "implies a necessity for a complete break down of defendant's free will." We reject this claim as frivolous.

"Free will" and "free judgment" are used interchangeably. (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1617 ["duress, fraud, or other fact overreaching the free will and judgment of a defendant"]; *People v. Huricks, supra*, 32 Cal.App.4th 1201 at p. 1208 ["such factors fail to establish that his free will was overcome in entering the plea"]; *People v. Hunt, supra*, 174 Cal.App.3d at p. 104 ["record does not demonstrate mistake, ignorance, or overbearance of his free will"].) The trial court utilized the proper standard as evidenced by its statement of reasons in denying defendant's motion.

Defendant argues his free judgment in entering his guilty plea was overcome by counsel's failure to interview or subpoena any witnesses or to locate a defense expert witness.

"Where a defendant has been denied the effective assistance of counsel in entering a plea of guilty, he is

entitled to reversal and an opportunity to withdraw his plea if he so desires. [Citations.]'" (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1356.) To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "If the defendant fails to show prejudice, a reviewing court may reject the claim without determining the sufficiency of counsel's performance." (*People v. Mendoza* (2000) 24 Cal.4th 130, 164.) "When a defendant expresses a desire to plead guilty, his counsel must investigate carefully all factual and legal defenses available to him. [Citation.] Prejudice occurs if counsel's acts or omissions adversely affect defendant's ability to knowingly, intelligently and voluntarily decide to enter a plea of guilty. [Citation.] If counsel's acts or omissions appear to result in defendant's entering a plea under the influence of 'mistake, ignorance or inadvertence or any other factor overreaching defendant's free and clear judgment' which would justify withdrawal of his plea, he was ineffectively represented by counsel. [Citation.]" (*People v. Hunt, supra*, 174 Cal.App.3d at p. 105.)

With respect to Burick's competence, the court found no clear and convincing evidence that there was a lack of preparation or inadequacy of counsel. Substantial evidence supports the trial court's finding.

"While an attorney is not obligated to interview every prospective witness [citation], it is patently incompetent for him to interview none regarding the crux of the anticipated defense . . . ." (*In re Cordero* (1988) 46 Cal.3d 161, 184.) Burick reviewed the reports from various doctors who had seen the films showing defendant's activities and who had concluded defendant was exaggerating his disability. Dr. Brown had opined in the alternative that it was possible defendant had had a good day while on his pain medications. Burick claimed the defense was whether the film showed defendant functioning on pain medications on a good day. Burick planned to cross-examine the prosecution doctors who were under subpoena. Although Burick received the list and summaries of conversations between defendant and his doctors, defendant did not provide, for purposes of his motion to withdraw his plea, the declarations or testimony of doctors stating that he or she would have testified other than as stated in his or her reports. Defendant failed to demonstrate he suffered any prejudice from Burick's reliance upon the reports rather than interviewing the witnesses.

With respect to Burick's failure to serve any subpoenas on defense witnesses, defendant argues, "competent trial practice is to serve the witness for the trial to guarantee that the witness is under the control of the court and then to modify the date of appearance as provided for in [Penal Code] section

1331.5.”<sup>1</sup> (Underscoring in original.) Burick had prepared subpoenas for five to six witnesses but had not served them. He planned to wait until he could estimate when the prosecution would finish presenting its case and then to have his investigator affect service. Burick held up service because he could not give the witnesses a particular time and because he had not decided whether they were needed. Burick uses the cooperative method which had always worked for him. He notifies the doctors in advance that they would be subpoenaed on or about a certain date and time but explains to them that he is unable to give them an exact time. Defendant failed to demonstrate that Burick’s customary cooperative method would have been unsuccessful. Defendant presented no evidence at the hearing on his motion that the defense witnesses would not have appeared and testified at trial. Defendant failed to demonstrate that Burick’s performance was deficient.

Defendant claims Burick rendered ineffective assistance in failing to obtain a defense expert to support his defense. Burick knew of no defense expert who would provide favorable testimony and had “asked around periodically” for someone to “testify concerning pain management and someone’s ability to do

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<sup>1</sup> Penal Code section 1331.5 provides, in relevant part, as follows: “Any person who is subpoenaed to appear at a session of court, or at the trial of an issue therein, may, in lieu of appearance at the time specified in the subpoena, agree with the party at whose request the subpoena was issued, to appear at another time or upon such notice as may be agreed upon.”

extraordinary things . . . .” In support of his motion to withdraw his plea, defendant presented no declaration or testimony that such a defense expert existed. Further, Burick was prepared to cross-examine Dr. Brown, a prosecution witness, who might provide favorable testimony to defendant. Defendant failed to demonstrate that Burick’s performance was deficient.

Finally, defendant claims his free judgment was overcome by his awareness that Burick had not interviewed any witnesses, had not subpoenaed any defense witnesses and had not obtained a defense expert. In his declaration in support of his motion to withdraw his plea, defendant stated that when he appeared in court to enter his plea, he believed Burick was not prepared for trial since to his knowledge no witnesses had been interviewed let alone subpoenaed for trial. When he testified at the hearing on his motion, defendant stated that Burick told him everything was “fine” but defendant should take the plea bargain to avoid a prison sentence. Burick had told him he had about a 20 percent chance of winning the case. Defendant did not testify that he knew Burick had not interviewed a single witness, that the defense witnesses had not been served with a subpoena or that Burick had not obtained a defense expert for trial. The trial court found defendant to be less than credible, which presumably includes his declaration. Defendant failed to demonstrate that he was so concerned about Burick’s failings that his free judgment was overcome and he entered his plea. Defendant was concerned about a lengthy prison sentence



which is not a valid basis to withdraw his plea. The trial court did not err in denying defendant's motion to withdraw his plea.

DISPOSITION

The judgment is affirmed.

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MORRISON, J.

We concur:

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DAVIS, Acting P.J.

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BUTZ, J.